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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. ROBINSON, JR., PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

SHOULD A CRIMINAL DEFENDANT'S POST-HYPNOTIC ADMISSIONS, SECURED DURING HIS INTERROGATION, BE SUPPRESSED UNDER:

(A) A *PER SE* RULE THAT EXCLUDES ALL POST-HYPNOTIC STATEMENTS AS INHERENTLY UNRELIABLE; OR

(B) UNDER A PROCEDURAL SAFEGUARDS APPROACH—ADOPTED BY SOME FEDERAL COURTS AND REJECTED BY OTHERS—WHICH EXCLUDES POST-HYPNOTIC STATEMENTS IF PROCEDURES DESIGNED TO ENHANCE THE LIKELIHOOD THAT ONLY RELIABLE EVIDENCE IS ADMITTED HAVE NOT BEEN OBSERVED?

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

STAFF SERGEANT JAMES A. ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Staff Sergeant (SSgt.) JAMES A. ROBINSON, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, entered in this proceeding on August 15, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 26 M.J. 361 (1988), and is reprinted in Appendix A hereto. The opinion of the United States Air Force Court of Military Review is reported at 21 M.J. 937 (1986), and is reprinted in Appendix B hereto. The ruling of the military judge on Petitioner's Motion to Suppress is not reported, but is reprinted in Appendix C.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on August 15, 1988. No petition for rehearing was filed. This petition for certiorari is filed within 60 days of the entry of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person . . . shall be . . . compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law. . . .

Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831(b):

> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

STATEMENT OF THE CASE

Petitioner was convicted by a general court-martial of murder, rape and sodomy, in violation of Articles 118, 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 920 and 925. He was sentenced to confinement for life, forfeitures, reduction to the lowest enlisted grade and dishonorable discharge. After the convening authority approved the sentence, the United States Air Force Court of Military Review affirmed the conviction, as did the United States Court of Military Appeals.

The victim of these crimes was Senior Airman Nancy Nittler who was stationed along with SSgt. Robinson at Ramstein Air Base, Federal Republic of Germany. On the night of April 13, 1982 she had been working at the service call desk at the Engineering Building at the base. The next

morning her body was found. There were no eyewitnesses to the crime, nor did the physical evidence reveal the identity of the perpetrator. Moreover, an extensive examination of the physical evidence did not yield any evidence inculpating SSgt. Robinson: None of the fingerprints, pubic hairs, blood or semen found at the scene matched those of SSgt. Robinson.

SSgt. Robinson came to the attention of the investigation two days after the crime, when he advised an agent of the Office of Special Investigations (OSI) that he had seen an altercation at the Engineering Building on the night of the crime. He stated that while driving by the building, he saw through the window a "tall shadowly male figure" making downward striking motions. He proceeded to his home because he did not think much of the incident at the time, and because he was not sure of what he had seen. Within a week of the initial interview, the OSI interviewed SSgt. Robinson's wife as to his whereabouts on the night of the crime and also administered a polygraph to SSgt. Robinson.

Three days later, the OSI requested that SSgt. Robinson undergo interviews while under the influence of hypnosis. Two hypnotic interviews were conducted on separate days, one lasting approximately two hours, the other lasting over an hour and a half. During each, SSgt. Robinson was asked to reveal what he remembered seeing on the night in question. During the course of those hypnotic sessions, SSgt. Robinson made no inculpatory statements. In the following months, the OSI conducted four additional non-hypnotic interviews. Again, SSgt. Robinson made no incriminating admissions.

By October 1982, six months after the crime had been committed, the OSI believed that SSgt. Robinson had committed the crime. By that time, the OSI had also determined that the case could be resolved only by securing

SSgt. Robinson's confession. On October 19, 1982 SSgt. Robinson was interrogated for a total of 13 hours by two OSI agents, after being advised of his rights under Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831(b). No verbatim record of what was said during the interrogation was kept, nor was any written statement prepared for, or signed by, SSgt. Robinson. The sole record at trial consisted of the OSI agents' report and the testimony of Agent Robert E. Lee, one of the interrogating agents.

During the initial portion of the interrogation SSgt. Robinson described events in much the same manner as he had narrated them during the preceding six months. But after approximately four hours of questions by the agents, SSgt. Robinson changed his story about not stopping at the building. According to Agent Lee, SSgt. Robinson admitted that he did not go immediately home after viewing the altercation at the Engineering Building, but instead circled back around and parked his car directly across the street. Agent Lee testified that SSgt. Robinson told the agents that he walked over to the Engineering Building, and looked through one of the windows, where he saw a man swinging an L-shaped object down on the victim, striking her on her head. Lee stated that SSgt. Robinson admitted entering the building and finding the victim sprawled on the floor of the adjacent technical order room. Lee further stated that SSgt. Robinson related that he was pushed from the back, got up and left the building, returned about 15 minutes later to the technical order room, although the victim and assailant were now missing. He returned to the service call area and straightened up the area, which he, allegedly, described as being in disarray.

According to Lee, SSgt. Robinson then followed a trail of blood down the hallway to the career advisor's office. There, he found the victim lying on the floor, slashed and

bleeding, with her pants and panties removed. Asked by Lee if he had sex with her, SSgt. Robinson at first, denied it, explaining that he would not have sex with a dead person. But, when Lee told him that the autopsy showed that the victim may have been alive at the time of intercourse, SSgt. Robinson supposedly said that he might have had intercourse with the victim. When Lee demanded a definite answer, SSgt. Robinson admitted, according to Lee, that he had had intercourse with her. Though the victim had been anally sodomized, SSgt. Robinson denied having anal intercourse with her. He further denied stabbing or killing her. The interview continued until it had lasted nearly 13 hours. With SSgt Robinson stating that he was tired, the interview was terminated.

Prior to trial, SSgt. Robinson moved to suppress the evidence concerning the admissions he had allegedly made during the interrogation on the grounds, *inter alia*, that they were tainted by hypnosis and involuntary. The trial court denied the motion.

SSgt. Robinson argued in the courts below that his alleged admissions should be suppressed because post-hypnotic statements are inherently unreliable. Expert testimony and judicial precedents from several state jurisdictions were offered, supporting the view that after a subject is hypnotized it may be impossible to determine whether a post-hypnotic statement was in fact historically accurate. The lower courts refused to adopt the *per se* rule urged by SSgt. Robinson, under which the admissions he allegedly made during his post-hypnotic interrogation would have been excluded from evidence, as inherently unreliable. The lower courts also rejected the procedural safeguards approach, which Petitioner urged in the alternative. Under this approach, post-hypnotic statements may be admitted only if there is compliance with various procedures designed to minimize the dangers of hypnosis.

In the instant case, there was expert testimony that hypnosis may well have infected SSgt. Robinson's statements to the OSI. Dr. (Col.) Thomas V. Hoyer, who sat on the sanity board convened to evaluate Petitioners mental state, testified:

> His state of mind in answering this questions (sic) [whether he had sex with the victim] appears to reasonably fit my own hypothesis that he might well have been in a *state of increased or heightened suggestibility*, a kind of confusion or uncertainty where more and more information, more and more statements and acknowledgements are being given where he is no longer as clear as to the significance of the statements and the implication of the statements and of the admissions that he is making. (emphasis added)

This testimony was corroborated by Dr. (Maj.) Thomas R. Mareth who also sat on the sanity board:

> The statement to us on the sanity board had a bizarre, fantastic—and by that I mean literally fantasy-like quality. It seemed dream-like. It seemed unreal. It did not seem like a plausible, reasonable, logically coherent confession or statement.

Despite the substantial risk that hypnosis may have impacted on alleged admissions, they were not suppressed.

REASONS FOR GRANTING THE WRIT

GRANTING CERTIORARI WOULD RESOLVE A FUNDAMENTAL QUESTION AFFECTING THE INTEGRITY OF THE CRIMINAL TRIAL'S FACT-FINDING PROCESS AND RESOLVE A CONFLICT AMONG THE FEDERAL COURTS.

In the recent past, courts in a number of jurisdictions have addressed the propriety of admitting into evidence post-hypnotic statements. The *per se* approach excludes all

post-hypnotic statements on the ground that they are inherently unreliable. *See, e.g., People* v. *Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P. 2d 775, *cert. denied*, 458 U.S. 860 (1982). This is clearly the "more prevalent" view. McCormick, *On Evidence*, § 206 at 633 (3d ed. 1984). A minority view holds that hypnosis merely affects the credibility of the testimony—not its admissibility—thereby allowing the trier of fact to assess its impact. *See, e.g., Chapman* v. *State*, 638 P.d 2d 1280 (Wyo. 1982).

In rejecting the *per se* rule for which SSgt. Robinson contends, the courts below disregarded the emerging judicial consensus among state jurisdictions, which holds that admitting post-hypnotic statements undermines the integrity of the trial's fact-finding process. Under this view, hypnosis destroys the basis for determining whether a statement is historically accurate or the product of fantasy. *State* v. *Mena*, 128 Ariz. 226, 624 P. 2d 1274 (1981). Attempting to determine whether a statement recalled after hypnosis is the result of the hypnotic treatment is beyond the power even of experts, much less jurors or judges. *State* v. *Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981). For this reason, post-hypnotic statements are inherently unreliable and should be excluded. *People* v. *Gonzales*, 415 Mich 615, 329 N.W.2d 743 (1982), *modified*, 417 Mich 968, 336 N.W.2d 751 (1983). According to one scholar, who is both a professor of law and a clinical psychiatrist, hypnotization of a witness is tantamount to the destruction of evidence:

> . . . once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, grate into their memories fantasies or suggestions deliberately or unwittingly

> communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or trier of fact. *The risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence.* (emphasis supplied)

Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Calif. L. Rev. 313, 314 (1980).

By granting certiorari in this case, this Court would have an opportunity to bring the military courts into harmony with the consensus that has emerged among state jurisdictions, under which the *per se* rule is viewed as the only appropriate safeguard against the inherent unreliability of post-hypnotic statements. This opportunity is particularly significant, since the basic due process concern with the fundamental fairness of the trial is at stake.

Review in this case would also give the Court the opportunity to clarify that its teaching in *Rock* v. *Arkansas*, ____ U.S. ____, 107 S.Ct. 2704 (1987), does not compel or counsel rejection of the *per se* rule where a criminal defendant seeks to exclude unreliable evidence. In *Rock*, this Court held that a criminal defendant could not be barred from testifying in his own defense under a state's *per se* rule barring post-hypnotic testimony. The Court of Military Appeals concluded that *Rock* offered support for the view that the *per se* rule would be inappropriate, even when a criminal defendant was attempting to *invoke* the *per se* rule to exclude inherently unreliable evidence. However, *Rock* does not counsel that result here, because the *per se* rule in this case does not infringe on a criminal defendant's right to testify in his own behalf—the salient

constitutional concern that moved this Court to invalidate the *per se* rule in *Rock*. By misconstruing *Rock*, the Court of Military Appeals may well lead other federal courts astray as to that decision's impact on the use of post-hypnotic statements in federal courts. Review in this case will thus assure that *Rock* is both correctly and uniformly interpreted by all federal courts.

Review in this case is also essential to bring harmony within the federal system with respect to hypnosis, since the federal courts that have addressed the issue have adopted varying and conflicting approaches. The procedural safeguards approach—an alternative urged here by Petitioner if the *per se* rule is rejected—was adopted in *Sprynczynatyk* v. *General Motors Corp.*, 771 F. 2d 1112, 1122-1123 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). There, the court required that (a) the hypnotic session be conducted by a licensed professional; (b) information given to the hypnotist be noted, preferably in written form; (c) the session be recorded; (d) only the hypnotist and the subject should be present. A more elaborate version of guidelines was set forth in *United States* v. *Harrington*, 18 M.J. 797, 803 (A.C.M.R. 1984). *Harrington* added the requirements that the hypnotist not be regularly employed by the prosecution or defense, and that the trial judge must determine, based on "clear and convincing evidence", whether the post-hypnotic statement carries internal indicia of reliability. The Ninth Circuit gave a similar but less detailed set of requirements in *United States* v. *Adams*, 581 F. 2d 193, 199 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1978). The Fifth Circuit in *United States* v. *Valdez*, 722 F. 2d 1196, 1203 (1984), endorsed the principle of procedural guidelines but did not elaborate on them, because it applied a variant of the *per se* rule.

Other federal courts have adopted approaches that are at variance with procedural safeguards and similar to the

approach of the courts below in the instant case. *United States* v. *Awkard*, 597 F.2d 667, 669 (9th Cir. 1979), *cert. denied,* 444 U.S. 885 (1979) (hypnosis affects credibility, but not admissibility, of testimony); *McQueen* v. *Garrison*, 814 F.2d 951, 958 (4th Cir. 1987) (individualized inquiry to determine reliability of evidence); *Wicker* v. *McCotter*, 783 F.2d 487, 492-493 (5th Cir. 1986) (probative value weighed against its prejudicial effect), *cert. denied,* 478 U.S. 1010 (1986).

Such a cacophony of approaches is intolerable in our federal system. Under these circumstances, review by this Court is necessary to insure that the federal courts speak to the dangers of hypnosis with one voice.

Moreover, should the Court bring harmony to the federal system by adopting a procedural safeguards approach, it will have the opportunity to consider a procedural safeguard that it is of increasing significance as hypnosis becomes more regularly employed as an investigative technique: requiring the interrogating agents to preserve a recorded version of any post-hypnotic interrogation. This requirement would be in harmony with a recent report by the National Institute of Justice of the U.S. Department of Justice:

> With the increased investigative use of hypnosis, an individual who had been hypnotized as a witness may at some later time becomes a suspect. In such an event, special procedures must be observed with regard to the subsequent waking interrogation because the memory of the witness/suspect may have been altered by the hypnosis session. During interrogation the authorities may wittingly or unwittingly use the hypnotically induced "information"—especially information that placed the subject at the scene of the crime—in order to elicit a confession.

> Because the hypnotically induced "information" may have been confabulated, the witness who has been subject to hypnosis procedures may be more vulnerable to later interrogation. Therefore, it is essential that the *waking* interrogation of a previously hypnotized witness be recorded—ideally videotaped, but at least audiotaped. The taped record is crucial to determine whether admissions or confessions were elicited voluntarily or whether the interrogator capitalized upon pseudomemories created during hypnosis (e.g., those produced by the "zooming-in" technique) in order to convince a suspect that he must have been at the scence of the crime because he could not otherwise have seen the details reported. (emphasis in the original)

Orne, Soskis, Dinges, Orne & Tonry, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering With Evidence*? National Institute of Justice Issues and Practices at 37 (U.S. Dept. of Justice, 1984).

In the instant case, the violation of this safeguard was particularly significant, as Dr. (Col.) Hoyer testified:

> . . . I would mightily have liked to have been able to have heard an exact transcript or to have seen a video tape of the interview in order to give a more definitive answer as to what his state of mind would have appeared to have been at that time.

The violation of this procedural safeguard and others[1] establishes the pressing need for this Court to fashion rules

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[1] The other procedural safeguards that were violated here include: the presence of criminal investigators, in addition to the hypnotist, at Petitioner's hypnotic sessions; the failure to record the information given by the Government to the hypnotist prior to the hypnotic sessions; the use of a hypnotist who is regularly employed by the Government; the failure of the trial judge, to determine whether the alleged

of procedural fairness, under which post-hypnotic statements may be admitted—if they are to be admitted at all.

CONCLUSION

Given the fundamental importance of the issue, the conflicting approaches of the federal courts and the wealth of judicial decisions which will aid the Court in its decision, review in this case is especially appropriate. For all these reasons, Petitioner SSgt James A. Robinson, Jr., requests that this Court grant a writ of certiorari.

Respectfully Submitted,

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admissions carry sufficient indicia of reliability, and to use a "clear and convincing evidence" standard in making that determination.

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 54591
ACM 24420

UNITED STATES, APPELLEE,

v.

JAMES A. ROBINSON, JR., STAFF SERGEANT,
U.S. AIR FORCE, APPELLANT

[Aug. 15, 1988]

Accused, staff sergeant, United States Air Force, was convicted by general court-martial, convened at Kapaun Air Station, Germany, Miguel A. Pereira, J., of rape, forcible sodomy and premeditated murder, and he appealed. The United States Air Force Court of Military Review, 21 M.J. 937, affirmed, and review was granted. The United States Court of Military Appeals, Everett, C.J., held that accused's pretrial inculpatory statements made to investigators were not involuntary as result of previous use of hypnotism to enhance accused's recollection of events surrounding crimes.

Affirmed.

1. Military Justice No. 1107

Inculpatory statements of accused to investigators were not involuntary, despite length of interview and accused's

reportedly weak character, in view of accused's being properly advised of his rights, lack of threats, force, promises, or deception, scheduling of interview to coincide with accused's normal tour of duty, accused's status as noncommissioned officer of some experience, with high school diploma and considerable military service, and relaxed nature of interview. UCMJ, Art. 31(b), 10 U.S.C.A. § 831(b).

2. Military Justice No. 1107

Character defect or personality quirk does not automatically render accused's statement inadmissible; even if accused has some inner compulsion to make confession and this is known to investigators, statement is not thereby rendered inadmissible.

3. Military Justice No. 1107

Previous use of hypnotism to enhance accused's recollection of events surrounding crimes did not per se render subsequent statements of accused inadmissible.

4. Military Justice No. 1107

Accused's pretrial inculpatory statements to investigators were not so intrinsically unreliable, as result of previous use of hypnotism to enhance accused's recollection of events surrounding crimes, that they could not properly be admitted in evidence, in view of length of time between interviews under hypnosis and session with investigators, great difference between what accused said under hypnosis and what he said later, qualifications of hypnotist, accused's not displaying any willingness to accept blindly investigator's theories about crimes, and testimony of forensic psychologist expressing doubt that accused ever had been in hypnotic state.

5. Military Justice No. 1107

Pretrial inculpatory statements of accused were not rendered involuntary by prior use of hypnotism to enhance accused's recollection of events surrounding crimes; from outset, accused wished to discuss crimes with others, and that predisposition, rather than any action by hypnostist, led to his statements.

For Appellant: *Mark A. Goldsmith,* Esq. (argued); *Clyde B. Pritchard,* Esq., *Colonel Leo L. Sergi, Major Charles E. Ambrose, Jr.* (on brief); *Captain Henry J. Schweiter.*

For Appellee: *Captain Marc Van Nuys* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief); *Colonel Kenneth R. Rengert* and *Major Joseph S. Kistler.*

Opinion of the Court

EVERETT, Chief Judge:

Contrary to his pleas, appellant was convicted by general court-martial of premeditated murder, rape, and forcible sodomy, in violation of Articles 118, 120, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 920, and 925, respectively. The members sentenced him to confinement for life, total forfeitures (a portion of which was later suspended), reduction to the lowest enlisted grade, and a dishonorable discharge. The convening authority approved the sentence, and the Court of Military Review affirmed. 21 M.J. 937 (1986).

We granted appellant's petition for review to consider this issue:

WHETHER APPELLANT'S "ADMISSIONS," MADE DURING DURING HIS INTERROGATION, SHOULD HAVE BEEN SUPPRESSED.

I

Senior Airman Nancy Nittler, the victim of the alleged crimes, had been on duty on the night of April 13, 1982, at the service-call desk of the Engineer Building at Ramstein Air Base, Federal Republic of Germany. She was killed late that night or very early the next morning. The gruesome details of these crimes are recited in the opinion of the court below (*id.* at 938) and need not be repeated here, except as they relate to the granted issue.

Robinson first came to the attention of the Air Force Office of Special Investigations (OSI) after he had appeared at the security-police desk at Ramstein Air Base on April 16, 1982, and stated that he had information concerning Airman Nittler's death. He was taken to the local OSI office, where he told investigators that he had driven by the crime scene between 11:30 p.m. and 12:30 a.m. on the night in question. Appellant stated that he had seen a tall, thin, light-haired male figure through a window of the room where Nittler had been killed. This person had made several striking motions with his right hand. When pressed for a possible identification, Robinson named Sergeant Kevin B. Curtis, who not only fit his description but also had been apprehended in the vicinity of the Engineer Building soon after the crime was discovered. Appellant told the investigators that he had not thought much about the scene he had observed and had driven on home. He had waited 2 days to report the events because he needed to collect his thoughts.

About 8 days later, the OSI interviewed Robinson's wife and questioned her about his whereabouts on the night of

the crimes. That same day appellant submitted to a polygraph examination after being advised of his Article 31(b) rights, 10 U.S.C. § 821(b).[1] Robinson then agreed to participate in the interviews which give rise to this appeal.

On April 27 and 29, 1982, he was interviewed while apparently being in an hypnotic state induced by Dr. Russell Hibler, an Air Force psychologist. These interviews were videotaped and were later played during trial in connection with cross-examination of Dr. Hibler when he was called by the defense to testify. Prior to his first interview under hypnosis, appellant repeated his general statement concerning his observations on the night of the crimes. Under hypnosis, he expanded his account and described the race, build, and dress of the person he had seen. Robinson also related that he visualized this individual to be swinging a pipe.

At the second interview, conducted 2 days later, appellant reported that he could see a larger figure assaulting a smaller figure with an object bent at a ninety-degree angle and with a wire attached—much like a desk microphone. During this session, appellant added other details to his description of that attacker—who, according to Robinson, resembled his supervisor, Captain Fuller.

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[1] *See* Uniform Code of Military Justice, 10 U.S.C. § 831(b). About April 19 an Airman First Class Slagel, who had been in the vicinity of the Engineer Building on the night of the crimes, helped the OSI produce a composite sketch of a person whom he had seen that evening. This sketch bore a striking resemblance to Robinson. Appellant has urged that at the time of the polygraph and hypnotically enhanced interview, he was already a suspect—apparently based on the evidence about this sketch and the interview of his wife by the OSI on April 24. However, we do not agree that the evidence compels this conclusion—especially since Slagel testified that he was sure that Robinson was not the person he had seen that evening.

After this interview, he added that this person also looked like Airman Nittler's husband but was taller and heavier. About a week later OSI agents again interviewed Robinson, this time in order to determine whether he could more positively identify the assailant as Captain Fuller.

About 10:30 p.m. on July 2, 1982, Robinson arrived in an extremely emotional state at the service-call desk of the Engineer Building. He told Staff Sergeant Tenay, the non-commissioned officer on duty, that he wanted to talk to the investigators about the case; and so Tenay called the OSI. Robinson displayed some bizzare behavior and informed Tenay that he believed that Staff Sergeant (SSgt) Brownell—who according to appellant was involved in an extra-marital affair with the victim—had been the killer.

Special Agent (SA) Lofties, who had previously interviewed appellant about the crimes, and SA Burris responded to the call. When they arrived, Robinson told them that he had received threats against his family and that he believed he needed protection—which he had previously declined. He also provided the agents with information he had been withholding—about having observed an automobile at the Engineer Building on the night of April 13. Appellant asserted that he had previously omitted this detail in order to locate the owner himself. He also told Lofties and Burris that he believed Brownell had been the source of the telephonic threat he had received.

SA Lofties took a statement from appellant on July 7. It was then that Robinson's story began to change significantly. He informed Lofties that he had been untruthful in the hypnotically enhanced interviews in April. Robinson also stated that he had not actually seen the figures at the window but had really seen a "vision" of the scene after he had arrived home. When pressed, he said that he had seen the attack and thereafter had seen the figures in his

"vision." [2] Robinson's description of this "vision" contained further details about the actual assault and a further identification of SSgt Brownell as the perpetrator.

Further changes in Robinson's account occurred when he was interviewed by SA Pearce on July 21. Then, for the first time, he informed the OSI agents that he had engaged in sexual intercourse with a bar girl on the night of the crime. Previously, he had only acknowledged talking to her.

In early September, Robinson told SSgt Brownell, who was a close friend of the Nittlers, that he regretted having identified Brownell as the killer but that at the earlier time he had believed that the assailant resembled Brownell. Appellant also volunteered information that Airman Nittler had made a sexual advance toward him—which he had rebuffed "because he was a married man."

At a party on September 15, appellant told Captain Fuller that he was depressed because he believed "that he could have prevented" Airman Nittler's murder; and he again stated "that he could identify the" perpetrator. Captain Fuller and two other individuals went to the Engineer Building with Robinson to reconstruct the crime scene. Along with appellant, Fuller stood outside the building, but only about half the distance from the building to the road where appellant claimed he had been driving on the night of the homicide. Fuller concluded that appellant could not have observed the crime from the road, as he had claimed. In turn, Fuller informed the OSI of his conclusion.

After evaluating the inconsistencies in Robinson's various interviews, the comments he had made to other servicemembers, and his seeming untruthfulness as to his

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[2] There are indications in the record that Robinson believed he was clairvoyant.

ability to observe the crimes, the OSI agents decided to question him as a possible suspect. On October 19, 1982, SA Lee and SA Thomas advised appellant of his Article 31(b) rights and then reinterviewed him about what had occurred on the night of April 13. This interview was scheduled to coincide with Robinson's duty hours, which did not conform with the normal work day. The session lasted about 13 hours—with one long break and a number of other interruptions. At the outset, Robinson appeared to be fresh and well rested. However, according to SA Lee, appellant had mentioned at the time that he was somewhat concerned about marital discord between his parents.

Initially appellant reiterated his earlier versions of his activities on the night of April 13—including his "visions" of the assailant. Asked about the clothing he had been wearing that night, Robinson replied that he had worn blue jeans, a plaid shirt, and a blue jacket. The agents then informed him that a person in similar clothing had been seen near the building that evening. They also told Robinson that the experiment conducted by Captain Fuller had indicated that appellant could not have observed the crime scene from his vehicle.

Robinson then began to change his story. He now admitted that he had left his car and gone to the building, where he had seen the assault on Airman Nittler through a window; and he gave the agents a graphic description of the crime. Thereupon, SA Lee told appellant that, if he had been inside the building, he should reveal this fact. Lee also informed him that the OSI was in possession of the jacket he said he had worn that night. Robinson expressed disbelief; and he refused to continue the interview until he was shown the jacket. A delay of about 90 minutes ensued while the evidence custodian produced the Jacket.

Lee told appellant that the jacket would be examined by the crime laboratory for forensic evidence and again informed Robinson that, if he had been inside the Engineer Building, he should not withhold this information. Robinson's story began to shift again. He admitted that he had been in the building and had seen the victim lying on the floor of the technical order room. Indeed, he described her wounds in some detail. However, Robinson contended that he himself had been assaulted by an unknown person.

In response to further questions from Lee, appellant recited that he had left the building, sat in his vehicle, and pondered what to do. He then reentered the building and looked for the body, but it was no longer in the technical order room. He also stated that he had straightened up the furniture—an action which would account for any fingerprints of his that might be found in the room.[3] SA Lee continued to ask appellant why had not called the authorities; but Robinson offered no explanation for this omission or for his decision to straighten up the furniture.

Appellant next described his search for Airman Nittler's body and related how he had found a trail of blood from the technical order room to the career counselor's office. Lee questioned his account as to the location of the victim's body; but appellant persisted in his description of this detail. Ultimately, Lee decided that he—not Robinson—was in error on this point.

Shifting to the question of sexual intercourse, the investigators then told appellant that an analysis of the sperm found in Nittler's body could point directly to the person who had engaged in sexual intercourse with her. Shortly after being told she may have been alive at the time

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[3] Appellant also made an inculpatory remark by telling the agents that he had righted a cot in the technical order room. Until then the agents had not known that the cot had been overturned.

of intercourse, appellant told the investigators that, after finding Airman Nittler, he had intercourse with her, but he claimed that he had not engaged in sodomy with her. Robinson stated that he might have gotten blood on his jacket at the time because he had laid it beside her head in a pool of blood.

There were discussions about the possibility of his palm prints being in the career counselor's office and about his footprint being found there. Robinson told the investigators that when he first came in the building, he had dodged "a sucker punch" and then was shoved to the floor in the technical order room. He advised SA Lee that he believed the attacker was Ron Stenson, a member of appellant's squadron.

SA Lee asked Robinson to describe his actions after having intercourse with the victim. Appellant responded that he had left the building, gone home, eaten, watched television, and then enjoyed "a good night's sleep."

At this point in the interview, it was near midnight; and Robinson's normal duty day would have been near an end. He told the agents that he was tired and wanted to see his wife. After a few more questions, Lee told appellant that they would break, and appellant agreed to return the following day. Robinson shook hands with Lee and was allowed to leave. Instead of returning the next morning, Robinson visited a psychiatrist and was hospitalized for observation. After his release, he once more began to assert that he had merely driven by the Engineer Building and had not left his automobile.

At trial, Robinson's defense centered on an attempt to show that his inculpatory remarks to SA Lee and SA Thomas should not be believed. To this end, the defense team played the tapes of the hypnotically enhanced interviews and called three expert witnesses: Dr. Martin T.

Orne, a recognized authority in the field;[4] Dr. Russell Hibler, who had conducted these interviews; and Dr. Neil Hibler, a forensice psychologist with OSI Headquarters.[5] Defense counsel sought to show that the interviews in April had caused Robinson to create false memories of events which did not exist.[6] In turn, appellant's belief in the reality of these memories led him—under the stress of the October 19 interview—to make inculpatory remarks, including his admission of sexual intercourse with the victim when she was either dead or near death from the bloody beating and stabbing.

Dr. Orne offered two theories as to how the technique used by Dr. Russell Hibler in interviewing Robinson under hypnosis in April might have affected the content of his admissions to the OSI agents in October. In the first place,

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[4] Dr. Orne's writings on forensic hypnosis are well known. *See, e.g.*, Orne, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311 (1979); M. Orne, D. Soskis, D. Dinges, and E. Orne, "Hypnotically Induced Testimony," in *Eyewitness Testimony: Psychological Perspectives* 211 (G. Wells and E. Loftus, eds. 1985). His guidelines for hypnotically-enhanced interviews were used by the New Jersey Supreme Court in *State v. Hurd*, 86 N.J. 525, 432 A.2d 86, 96 (1981). Dr. Orne chaired a panel of the Council on Scientific Affairs which produced a Report on *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918 (1985). For further description of his qualifications, *see People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 270 n. 45, 723 P.2d 1354, 1381 n. 45 (1982).

[5] In the seemingly small world of forensic hypnosis, the three defense witnesses were all colleagues. Dr. Russell Hibler and Dr. Neil Hibler were twin brothers and members of the Air Force. Dr. Orne had collaborated with Dr. Neil Hibler in writing a chapter in a handbook concerning use of hypnosis in federal criminal investigations.

[6] This phenomenon—termed confabulation by forensic hypnotists—involves "fill[ing] in details from the imagination in order to make an answer more coherent and complete." *See Rock v. Arkansas*, __ U.S. __, 107 S.Ct. 2704, 2713, 97 L.Ed.2d 37 (1987).

since Dr. Russell Hibler had used a "television" technique—"zooming in" on certain events, stopping the action, and going forward and backward—appellant had been induced to fill in details on his own and ultimately had been led to state that he had entered the Engineer Building, observed Airman Nittler, and had sexual relations with her while she was dead or dying. Dr. Orne's second and somewhat "more conjectural" theory was that, pursuant to post-hypnotic suggestion experienced in April, Robinson had gone into an hypnotic state during the October interview. According to this expert, if either theory applied, the results of the October interview were questionable—both as to reliability and voluntariness.

Dr. Orne also testified that, after reviewing all of the evidence, he believed that Robinson genuinely could not remember the events of the night of April 13. He premised this hypothesis on his conclusion that appellant had been intoxicated at that time and had suffered from severe memory gaps as a result. In Dr. Orne's opinion, Robinson had filled in these gaps because of the hypnotist's suggestions that he would be able to remember more and more about the events of that night and because of appellant's own belief that he was clairvoyant.

Yet, even some of the other defense evidence did not conform with Dr. Orne's theories. From listening to the tapes of the two interviews conducted in April, Dr. Orne had concluded that Robinson had been in an hypnotic state; but, on the basis of an extensive review of these tapes—performed both before trial and later in court—Dr. Neil Hibler testified that certain physical phenomena led him to conclude that appellant had been simulating an hypnotic state. Both Dr. Russell Hibler—who had been the hypnotist—and Dr. Neil Hibler were of the opinion that, due to the long interval involved, the two interviews

in April, when hypnosis was used, would have had no effect on appellant's discussion in October with the OSI agents. Indeed, Dr. Orne himself conceded that he could find no direct connection between the events in April and Robinson's inculpatory statements 6 months later; and he acknowledged that his hypnosis as to the later effects of the hypnotically enhanced interviews was simply an alternative to be considered in evaluating all the evidence in the case.

During cross-examination, Dr. Orne admitted that there were three problems with his hypotheses. First, contrary to his premise that there had been "lacunae" or memory deficits due to appellant's intoxication on the night of April 13, Robinson had claimed throughout the investigation that he had an excellent memory of that night; and an extensive sanity examination of appellant, performed after the October interviews, failed to reveal any memory deficits. Secondly, Dr. Orne could not reconcile his theory with appellant's extremely accurate knowledge of certain details of the crime. Finally—and perhaps most telling—was Dr. Orne's testimony that if Robinson had, in fact, falsely confessed to crimes some 6 months after being hypnotized, this would have been unique in his own experience with forensic hypnosis.[7]

II

A

[1, 2] Appellant argues that his statements to the OSI agents in October were involuntary and were also unreliable. In this connection he points to the length of the interview, and he suggests that the interview was conducted in

[7] Dr. Neil Hibler went even further in stating not only that it would be a first in his experience, but also that he had never read of such a case in the literature on forensic hypnosis.

"an emotionally charged atmosphere." Moreover, he claims that his weak character—as evidenced by his belief in his own clairvoyance, his alcohol abuse, and his tendency to inflate his importance and his achievements—rendered him susceptible to manipulation by the investigators. Finally, Robinson contends that any statements made by him after the hypnotically enhanced interviews in April were *per se* inadmissible.

The military judge's findings of fact (21 M.J. at 944) as to the voluntariness of Robinson's statements undercut appellant's contentions.[8] For example, the judge found that appellant was properly advised of his Article 31(b) rights at the outset of the interview; that the OSI agents utilized no threats, force, promises, or deception to induce appellant's statements; that, although the interview took considerable time, numerous interruptions occurred, and the interview had been purposely scheduled to coincide wth appellant's normal tour of duty; that appellant was a noncommissioned officer "of some experience," with a high school diploma and considerable military service; and that the interview had been conducted in a relaxed atmosphere.

Far from being "emotionally charged," the October interview was conducted in a relaxed atmosphere. Unlike the situation in *United States v. Collier,* 1 M.J. 358 (C.M.A.1976), the investigators here did not prepare the accused for a confession by playing on his emotions over an extended period of time before asking him about the crime.

Admittedly, Robinson related some unusual dreams and demonstrated behavior which one would not expect from a noncommissioned officer of the Armed Forces. More-

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[8] The evidence in the record of trial amply supports these findings; and so they should not be disturbed. *See United States v. Burris,* 21 M.J. 140, 143 n. 7 (C.M.A.1985).

over, he was hospitalized at his own request for medical observation on the day after his session with the OSI agents. However, the evidence of record does not indicate that he was mentally unstable at that time; and there is no showing that the OSI agents were seeking to use knowledge of any emotional weakness on his part as a means to obtain a confession.

Robinson exhibited an almost pathological need to discuss the crimes that had been committed. On no less than nine occasions he voluntarily told investigators or other persons that he had information about these crimes. However, his behavior during the interview in October does not suggest that he was easily led. When the investigators told him they had his jacket, he adamantly refused to continue with the interview until they produced it; and at two other ponits in the interview he challenged SA Lee's perception of the crime scene and ultimately convinced the investigator that appellant—not Lee—was correct.

Certainly, a character defect or personality quirk does not automatically render an accused's statement inadmissible. Even if an accused has some inner compulsion to make a confession and this is known to the investigators, his statement is not thereby rendered inadmissible. *Cf. United States v. Wheeler,* 22 M.J. 76 (C.M.A.), cert. denied, __ U.S. __, 107 S.Ct. 106, 93 L.Ed.2d 55 (1986); *see Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *see also Oregon v. Elstad,* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

B

[3-5] The unique aspect of this case is the use of hypnotism to enhance appellant's recollection of events surrounding the crimes. Hypnotism, of course, is not a recently discovered phenomenon. Instead, it has been

recognized for many centuries. For example, there are ancient legends about persons who were hypnotized by the swinging of a watch or other shining object before their eyes. Hypnotism was used by Sigmund Freud in some of his early work and played a part in the development of his theory of the subconscious mind. In recent decades, hypnotists have even performed as entertainers before large audiences.

Investigators have begun to use hypnosis to retrieve the repressed recollection of witnesses of crimes, accidents, or other startling events. However, scientists have disagreed as to the reliability of evidence resulting from hypnotically refreshed recollection. One report concludes that

> when hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. When the third condition results, the individual is less likely to be able to discriminate between accurate and inaccurate recollections. There . . . [is] no . . . support [for] a fourth alternative . . . that hypnosis increases remembering of only accurate information.
>
> Contrary to what is generally believed by the public, recollections obtained during hypnosis not only fail to be more accurate but actually appear to be generally less reliable than nonhypnotic recall. . . .

Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the use of Hypnosis,* 253 J.A.M.A. 1918, 1921 (1985).

One problem is that the "hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended." *State v. Mack,* 292 N.W.2d 764, 768 (Minn. 1980). According to one expert:

> Hypnosis is, almost by definition, a state of increased suggestibility. . . . [S]uch suggestions cannot be avoided. The suggestive instructions and cues provided to the subject need not be, and often are not, verbal. The attitude, demeanor, and expectations of the hypnotist, his tone of voice, and his body language may all communicate suggestive messages to the subject. Especially powerful as an agent of suggestion is the context and purpose of the hypnotic session. Most hypnotic subjects aim to please.

Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 Cal.L.Rev. 313, 333 (1980).

Added to the problem of suggestibility is that of "confabulation." *Id.* at 335. *See* n.6 to this opinion. Because the hypnotic subject wishes "to comply with the hypnotist's suggestions . . . the hypnotically recalled memory is apt to be a mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." Diamond, *supra* at 335.

Finally, the reliability of hypnotically enhanced testimony is diminished by "memory hardening," which the Supreme Court of Minnesota described in this way:

> A witness who was unclear about his "story" before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. This conviction is so firm that the ordinary "indicia of reliability" are completely erased, and hypnotic subjects have been able to pass lie detector tests

> while attesting to the truth of statements they made under hypnosis which researchers knew to be utterly false. It would be impossible to cross-examine such a witness in any meaningful way.

State v. Mack, supra at 769 (footnote omitted).

Because of the possible unreliability of testimony given by a witness after he has been subjected to hypnosis, courts have differed widely as to admissibility of such testimony.[9]

In some jurisdictions, the testimony is automatically excluded. *See, e.g., State v. Collins,* 296 Md. 670, 464 A.2d 1028 (1983), *overruling Harding v. State,* 5 Md. App. 230, 246 A.2d 302 (1968); *Commonwealth v. Kater,* 388 Mass. 519, 447 N.E.2d 1190 (1983); *People v. Shirley,* 31 Cal.3d 18, 181 Cal.Rptr. 243, 723 P.2d 1354 (1982); *State v. Mack, supra.*

Elsewhere, hypnotically induced testimony is allowed only if various procedural safeguards were observed when the hypnosis was performed. Thus, in *State v. Hurd,* 86 N.J. 525, 432 A.2d 86 (1981), the New Jersey Supreme Court imposed these six requirements:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. . . .
>
> Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecution, investigator, or defense. . . .
>
> Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded . . .

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[9] See cases collected by Judge Su-Brown in *United States v. Harrington,* 18 M.J. 797, 802 (A.C.M.R.1984), and by the Supreme Court in *Rock v. Arkansas,* __ U.S. __, 107 S.Ct. 2704, 2712-13, 97 L.Ed.2d 37 (1987), which cites *Harrington. Id.,* 107 S.Ct. at 2713 n. 16.

> Fourth, *before* inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. . . .
>
> Fifth, all contacts between the hypnotist and the subject must be recorded. . . .
>
> Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session . . .

Id., 432 A.2d at 96-97.

In other cases, emphasis has been placed on the procedural safeguards employed in an hypnotically-enhanced interview with a witness, but no *per se* rule has been imposed. *See, e.g., McQueen v. Garrison,* 814 F.2d 951 (4th Cir.), *cert. denied,* __ U.S. __, 108 S.Ct. 332, 98 L.Ed.2d 359 (1987); *Sprynczynatyk v. General Motors Corporation,* 771 F.2d 1112 (8th Cir.1985), *cert. denied,* 475 U.S. 1046, 106 S.Ct. 1263, 89 L.Ed.2d 572 (1986); *United States v. Valdez,* 722 F.2d 1196, 1203 (5th Cir.1984); *State v. Armstrong,* 110 Wis.2d 555, 329 N.W.2d 386 (1983). In *Harker v. Maryland,* 800 F.2d 437 (1986), the Fourth Circuit upheld admission of hypnotically-induced testimony, since there had been some procedural safeguards in connection with the interview under hypnosis and also because there was independent corroborating evidence.

A third judicial approach is to treat the prior hypnosis of a witness as a circumstance which affects credibility but does not make the testimony so unreliable that it must be excluded from evidence. Moreover, a few "courts conduct an individualized inquiry in each case." *See Rock v. Arkansas,* __ U.S. __, 107 S.Ct. 2704, 2713 n. 16, 97 L.Ed.2d 37 (1987).

Recently, in *Rock,* the Supreme Court reviewed a conviction in a case where the trial court had ruled that, under Arkansas evidentiary rules, hypnotically refreshed testimony of the defendant was inadmissible and that her testi-

mony would be limited to reiteration of statements she had made to the doctor prior to hypnosis as those comments were reported in the doctor's notes. Writing for five justices, Justice Blackmun explained that the Arkansas *per se* rule prohibiting admission at trial of any defendant's hypnotically-refreshed testimony violated a defendant's "right to testify in" his "own behalf," which "has sources in several provisions of the Constitution." *See* 107 S.Ct. at 2709. *Cf. Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas,* 388 U.S 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

After pointing out that guidelines "do provide a means of controlling overt suggestions," Justice Blackmun observed:

> The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.
>
> We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of pre-

> hypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defenant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.[10]

Id., 107 S.Ct. at 2714.

In the case at bar, Robinson is not seeking to offer testimony. Instead, he wishes to exclude evidence of pretrial statements that he made to OSI agents. Thus, we are not presented with the constitutional claim that was made in *Rock v. Arkansas, supra,* and which was upheld there by the Supreme Court. However, some of the majority's rationale in *Rock* suggests that here we should not apply a *per se* rule of inadmissibility. As the Supreme Court observed, "Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence." In this case, there was corroboration of state-

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[10] *See* 107 S.Ct. at 2716. Chief Justice Rehnquist, writing for the four dissenters, asserted that the Arkansas *per se* rule of exclusion "was an entirely permissible response to a novel and difficult question" and constituted a reasonable restriction on a defendant's right to present evidence.

ments made to the OSI agents in October. Secondly, just as "a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions," the members of the court-martial were educated about such risks by testimony from Dr. Orne, probably the foremost American authority on forensic hypnosis, and from two other highly qualified experts, one of whom had performed the hypnosis of appellant. Furthermore, the evidence "establish[ed] carefully the extent of . . . [Robinson's] memory prior to hypnosis"; and the defense was well positioned to demonstrate how appellant's statements to the OSI agents might have been influenced by "suggestibility," "confabulation," or "memory hardening."

The length of time between the two interviews under hypnosis in April and the session with the agents in October, and the great difference between what Robinson said under hypnosis and what he said later, minimize the likelihood that hypnosis had any impact on his statements to the OSI. Moreover, the hypnosis was performed by a highly qualified expert under circumstances that lessen the likelihood of improper suggestion. Significantly, when later he was being interviewed by the OSI agents, Robinson did not display any willingness to accept blindly their theories about the crimes; and, in one instance, appellant convinced the investigator that his own hypothesis was in error and that Robinson's account was correct. Finally, we note that at trial Dr. Neil Hibler even expressed doubt that appellant ever had been in an hypnotic state. We conclude, therefore, that under the circumstances of this case, appellant's pretrial statements to the OSI agents were not so intrinsically unreliable that they could not properly be admitted in evidence by the military judge.

Furthermore, even though use of hypnosis in interviewing Robinson in April is relevant to the voluntariness of

his statements in October, *cf. Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954), it is clear that this hypnosis did not affect the voluntariness of appellant's October statement. Instead, from the outset, appellant wished to discuss the crime with others; and this predisposition on his part, rather than any action by the hypnotist, led to his statements to the OSI.[11]

III

We conclude that the evidence in this record fully supports the military judge's findings and makes clear that appellant's admissions were voluntary and sufficiently reliable to be submitted to the court-martial members.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

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[11] Appellant has also contended that the OSI violated Air Force Regulation 124-14, dated December 17, 1981, which concerns Forensic Hypnosis and which states in paragraph 2*b*, "Subjects of investigations who may be prosecuted must not be hypnotized unless the subject or subject's counsel requests it." However, when he was hypnotized, Robinson was not the "subject" of an investigation; and hypnosis was used in a bona fide attempt to obtain information from him about crimes which—on the basis of his comments—were believed to have been committed by someone else. We agree with the court below that this provision in the regulation was intended to prevent use of "hypnosis as a means of coercing subjects of investigations to confess," and therefore, "it addresses the issue of voluntariness." 21 M.J. 937, 944. *Cf. Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed.948 (1954). In view of the judge's findings that Robinson did not experience a self-induced trance during the October interrogation and that the hypnosis had no impact on the statement he made at that time, it is clear that the policy of the regulation was not violated in any way.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 24420

UNITED STATES

v.

STAFF SERGEANT JAMES A. ROBINSON, JR., FR 378-62-1914
UNITED STATES AIR FORCE

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18 FEB 1986

Sentence adjudged 8 September 1983, by GCM convened at Kapaun Air Station, Germany. Military Judge: Miguel A. Pereira.

Approved sentence: Dishonorable discharge, confinement for life, forfeiture of all pay and allowances, reduction to airman basic.

Appellate Counsel for the Accused: Mr Clyde B. Pritchard, Detroit, Michigan, Mr Mark A. Goldsmith, Birmingham, Michigan, Colonel Leo L. Sergi and Captain Bruce T. Brown. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Lieutenant Colonel Donal F. Hartman, Jr., Major Robert E. Ferencik, Jr. and Captain Joseph S. Kistler.

Before

SESSOMS, CANELLOS and CARPARELLI
Appellate Military Judges

DECISION

CARPARELLI, Judge:

The appellant has been convicted of the rape, forcible sodomy, and premeditated murder of Senior Airman Nancy Nittler. He was sentenced to a dishonorable discharge, life imprisonment, total forfeitures, and reduction to airman basic. Appellate defense counsel have assigned five errors for our consideration. We find them them all to be without merit and affirm the findings and sentence. We will, however, discuss the first assigned error. It asserts that an incriminating statement made by the accused on 19 October 1982 should have been suppressed because it arose from a hypnotic interview six months earlier, was involuntary, and was inadequately corroborated.

I. FACTS

On the evening of 13 April 1982 the victim worked the night shift in Building 520, Ramstein Air Base, Germany. She worked alone as the civil engineering service call monitor. Because of an on-going construction project, she was unable to lock the main entrance to the building near the service call desk. That evening, between 2130 and 2230 hours, she was visited by other members of the civil engineering squadron. The last known visitor was Senior Airman Wood who stopped to get some maps. Senior Airman Wood testified that, as she left the building, about 2230 hours, she saw the victim preparing to go to sleep on a cot near the service call desk.

About 0615 hours the next morning Senior Airman Nittler's body was found in the career advisor's office, another room in the building. Examination of the body revealed that she had been brutally assaulted, raped, and anally sodomized. The body bore defense wounds on both

forearms, two blunt instrument wounds on the head, internal and external injuries indicating strangulation, one superficial cut on the neck, and two deeper cuts, one of which severed her jugular vein and caused her death.

The cot in the service call room contained a large blood stain which someone had attempted to conceal by placing a blanket over it. Later examination of the flow pattern of the blood stain and experimentation with the cot showed that, at some time while the blood was fresh, the cot had been tipped on its side and later righted. There was blood splattered near the cot, another large blood stain on the floor, and a trail of blood leading to the next room, the technical order room. Except for the blood stains, however, neither the service call room nor the technical order room showed any signs of a struggle. A heavy and obvious trail of blood led from the technical order room, down a corridor to the career advisor's office. The body was found face down in the career advisor's office and was naked below the waist. The victim's head was near the door and there was a large pool of blood to the right of her head.

The pathologist concluded that the head wounds and strangulation had been inflicted in the service call room, the neck wounds had been inflicted in the career advisor's office, and the rape and anal sodomy had been perpetrated in the career advisor's office either before the victim's neck was cut or shortly thereafter while the victim was in the throes of dying. Analysis of the evidence at the crime scene indicated that the victim has been dragged down the hallway by her feet after she had been rendered unconscious by the head wounds and strangulation.

All the blood stains were consistent with the victim's blood. None of the latent fingerprints found at the scene were identified as those of the appellant or any of the other suspects in the case. Pubic hairs were collected from

the floor of the career advisor's office and examined by the criminal investigation laboratory. The laboratory was unable, however, to connect the hairs with any suspect.

Swabs from the victim's vagina and rectum and washings of the victim's pubic hair revealed the presence of semen. Comparison of these samples with relevant information regarding the appellant's blood type and body fluid chemistry indicated that the appellant could have been the source of the semen.

On the evening of 16 April 1982 the appellant went to the security police desk and said that he had some information regarding the crime. When questioned by an agent of the Office of Special Investigations (OSI) the appellant said he was driving past building 520 sometime between 2330 and 0030 hours on the night of the crime and, through a part in the window curtains, saw a tall male shadowy figure in the service call room. The figure had its right hand in the air and made several downward motions as if striking something. He described the figure as tall, thin, light-haired, and wearing a dark, possibly plaid, shirt. The appellant said he had seen the figure from his vehicle in the course of two to five seconds as he drove past the building. He explained that he drove home and did not think much of it at the time. He said he waited to report his observations because he wasn't sure of what he had seen and needed to get his thoughts together. When asked who he thought the figure was, the appellant named Sergeant Kevin B. Curtis. Curtis, in fact, was six feet four inches tall, weighed only 135 pounds, and was on duty all night across the street from building 520 on the night of the murder. He had been quickly and publicly apprehended outside building 520 on the morning of 14 April after law enforcement agencies had responded to the crime scene.

On 27 April 1982 and again on 29 April 1982 the appellant agreed to undergo hypnosis in an effort to recall as much as possible about what he had seen. Video tapes of the entirety of both interviews were admitted as prosecution exhibits during cross examination of the hypnotist, Major Russell Hibler, Ph.D.

During the hypnotic interview the appellant said he was driving past building 520 and saw a tall white male swinging what appeared to be a piece of pipe or a stick. He described the assailant as having blond or light brown hair parted in the middle and standing a head taller than the victim, "Maybe five-six [sic], maybe a little shorter."

Two days later the appellant again consented to a hypnotic interview with the same psychologist and agents. At the time he described the assailant as much taller than the victim. He said the assailant looked similar to the victim's husband but was heftier.

During the next five months the appellant told others about what he had seen and he expressed his concerns and suspicions about the case. He also spoke with OSI agents on 2 July, 7 July, and 21 July 1982. On the first two occasions he continued to tell the OSI agents that he had merely driven past the crime scene and he provided additional information which tended to cast suspicion on Staff Sergeant Joseph Brownell, a friend of the victim. During the 7 July interview the appellant said that, after he arrived home in the early morning of 15 April, he saw a vision in which he saw a face and the lower portion of a jaw and a mouth which appeared to be chewing raw flesh. He described the jaw as similar to Brownell's. On 21 July he volunteered a claim that, before driving past building 520, he had sexual intercourse with a bar girl at the Scotch Bar in Landstuhl. At trial, however, the bar girl contradicted this claim.

On 19 October 1982, the appellant was called in by OSI agents Lee and Thomas, waived his rights, and was interviewed as a suspect. The interview began about 1300 hours and ended about 0130 hours on 20 October. The OSI deliberately scheduled the interview to begin in the afternoon because the appellant's normal work shift was between 1600 and 2400 hours. The interview was conducted in a relaxed, low-key manner and included a one and one-half hour break and occasional shorter breaks. The questioning ended when the appellant said he was tired and wanted to go home. The appellant did not ask for counsel during the interview.

In the course of this interview the appellant again said that he had intercourse with a bar girl at the Scotch Bar. He reiterated that, after passing the crime scene and seeing the figures in the window, he had gone home and watched television. He again said that after arriving home, he saw a vision of a man's head with blood running out of his teeth. After the appellant maintained his account of the evening's events for about four hours, the OSI agents told him that no one else had reported visions of the sort he described. They also told him that his clothing on the night of the crime matched a report of a person seen in the vicinity of the crime near the time of the crime. In addition, they noted that others who had tried to see through the window of the service call room, under similar circumstances as the appellant had reported, were unable to observe comparable details. The appellant then explained that he did not drive straight home but instead circled back, got out of his car, and walked to the window. He said he saw the victim with her forearms in front of her face, trying to protect herself. He said she was struck above her eyes, on the side of her head, and possibly on her arms. As appellant watched her try to get away the assailant cut her on both sides of her neck.

When confronted with the possibility of evidence suggesting he may have been inside the building, the appellant said he had gone in and saw the victim lying on the floor of the room next to the service call room. He reported that he was pushed from behind onto his knees and then heard footsteps going down the hallway. After being pushed he saw a gaping wound in the victim's neck and described it as similar to that made by a dog shaking a rabbit with its mouth. He said he went out to his car, sat in it for about ten minutes, and got in and out of it two or three times. He said that after fifteen minutes he went back in unarmed. He explained his seeming bravado by saying that he had once defended himself against a bear and that he performed best under stress or fear.

Although Special Agent Lee did not know or suggest that the cot in the service call room had been tipped over, the appellant explained that, upon re-entering the service call room, he found the cot tipped on its side with the legs toward the center of the room. He said that he put the cot on its legs and straightened up the room. He noted that this would explain the presence of his fingerprints in the room. He reported seeing a trail of blood leading to the career advisor's office. He described the bloody trail as being similar to that made when a deer is dragged by its hind quarters. He also noted that the trail thickened just in front of the career advisor's office and referred to it as a hesitation spot, as if the assailant had stopped and turned into the office. When the appellant told Lee that the victim had been left on the floor of the career advisor's office with her head near the door, Agent Lee doubted the accuracy of the description and questioned him more thoroughly. Lee had not seen the body at the scene and had misinterpreted a diagram and a photo in the investigative report. Despite Lee's questions, however, the

appellant maintained his accurate description of the victim's position and did not yield to Lee's doubts.

Finally, after being told that chemical tests of semen taken from the victim's body could be used to identify the assailant, the appellant stated that he had sexual intercourse with the victim as she lay unconscious in the career advisor's office. Nonetheless, he denied that he was the primary assailant and that he had anally sodomized the victim. When the appellant was asked to identify the primary assailant he said he was sixty to seventy per cent sure it was an Air Force member named Ron Stenson.

At the conclusion of the interrogation the appellant appeared calm. He said he felt better for having been able to talk about the incident. He also said he was a little tired and wanted to go home to be with his wife. He shook hands with Mr Lee and agreed to return the next day to continue the interview. The next morning the appellant was taken to see a psychiatrist. The psychiatrist described him as very depressed, teary eyed, and extremely frightened. The appellant also expressed suicidal ideations. He later told members of a sanity board that he was so confused that morning that he had been unable to identify his wife for the first half hour he was with her. Although the defense's expert witness regarding hypnosis declined to conclude that the appellant entered a trance state in the course of the interrogation, appellate counsel suggest that the length and stress of the interrogation may have had such a result.

II. ADMISSIBILITY OF APPELLANT'S OCTOBER STATEMENTS

Appellate defense counsel have argued that the military judge erred when he denied appellant's motion to suppress the statements of 19 October. They contend that the length and circumstances of the October interrogation rendered

those statements involuntary. Moreover, they say the statements were inadequately corroborated. Mil.R.Evid. 304(g). In addition to these considerations, appellate defense counsel also argue that the April hypnotic interviews had significant and lasting effects on the appellant and that these effects further undermined the appelant's free will during the October interrogation. They also refer us to various state court decisions regarding the inadmissibility of the testimony of witnessess who have been previously hypnotized. *See, e.g., Commonwealth v. Kater,* 447 N.E.2d 1190 (Mass. 1983); *People v. Gonzales,* 329 N.W.2d 743, *order upon reconsideration,* 336 N.W.2d 751 (Mich. 1983); *People v. Hughes,* 453 N.E.2d 484 (N.Y. 1983); *State ex rel Collins v. Superior Court,* 644 P.2d 1266 (Ariz. 1982); *People v. Shirley,* 641 P.2d 775 (Cal. 1982), *cert. denied,* 459 U.S. 860 (1982); *State v. Mack,* 292 N.W.2d 764 (Minn. 1980). They urge us too adopt the reasoning of those courts and to rule that, because the appellant had been previously hypnotized, the October statements were inadmissible *per se.* In the alternative they contend that the hypnotic interviews in April were contrary to Air Force directive, as well as, the guidelines applied to hypnotized witnesses by the Army Court of Military Review. Air Force Regulation 124-14, *Forensic Hypnosis,* 17 December 1981, paragraph 2b.; *United States v. Harrington,* 18 M.J. 797, 803 (A.C.M.R. 1984). They argue that if this court is not inclined to adopt a rule of *per se* inadmissibility we should find that the failure to follow required guidelines in the course of the hypnotic interviews rendered all subsequent statements inadmissible. We decline to adopt either a *per se* rule or a guidelines approach in this case. Instead, we find well established rules regarding voluntariness and corroboration provide the best and most appropriate method of

determining the admissibility of the appellant's October statements.

A. ***Evidence Regarding Hypnosis***

According to the testimony and the treatises admitted at trial, hypnosis is an altered state of consciousness in which an individual becomes more susceptible to suggestion and becomes less able to critically evaluate both his or her own thoughts and suggestions made by the hypnotist. Although accurate memories may be recalled and related during hypnosis, information developed in the course of hypnosis can also be the result of confabulation rather than recall. Confabulation is the process whereby memory gaps are filled by mental images. The confabulated memories can arise from the imagination of the hypnotized subject and from intentional or unwitting suggestions from the hypnotist. 27:4 Int'l J. Clinical & Experimental Hypnosis (1979); Orne, Soskis, Dinges, Orne, *Hypnotically Induced Testimony,* in Eyewitness Testimony: Psychological Perspectives (G.L. Wells and E.F. Loftus ed. 1984); and Plotkin, *The Previously Hypnotized Witness: Is His Testimony Admissible*? 106 Military L. Rev. 163 (1984).

The evidence also showed that individuals differ in their susceptibility to hypnosis and that the question of whether a given subject is, in fact, hypnotized or is "simulating" or feigning a trance cannot be reliably determined even by experienced hypnotists. According to defense witness Doctor Martin T. Orne, an eminent authority on hypnosis, he and his wife are the only living hypnotists who have developed valid techniques to distinguish between hypnotized subjects and simulating subjects. The evidence also showed that subjects who enter a true trance, can, intentionally withhold information and can intentionally relate information which the subject knows is false.

Upon returning to a normal waking state a subject may exhibit equal confidence in the validity of natural memories and confabulated pseudo-memories. It is the combination of confabulation, a witness' apparent confidence in the validity of such pseudo-memories, and the danger that fact-finders will be unable to distinguish between testimony based on memory and testimony based on pseudo-memory, that gives courts concern about the use of hypnosis to assist witnesses to recall earlier events and observations.

B. ***Doctor Orne's Testimony***

In support of their position, trial defense counsel called and elicited testimony from Doctor Orne. The direct and cross examinations lasted four days. Doctor Orne concluded that, consistent with the evidence, but contrary to the appellant's assertions to others before the trial, appellant was drunk on the evening of the murder and suffered from gaps in his memory regarding the events of that evening. Doctor Orne said he had studied the video tapes of the hypnotic interviews and concluded that the appellant was, in fact, hypnotized and not simulating during the two interviews. He noted that the hypnotist told appellant that hypnosis could enable the appellant to recall reliable and more detailed information regarding his observations of the crime scene. In the course of the interview of 29 April the appellant was encouraged to "zoom in" and get a closer view of the events he said he saw. In addition, he was told that he could use some of the hypnotic relaxation techniques on his own and that he might thereby recall further details of the crime.

Doctor Orne testified that these suggestions could have various effects. First, the appellant was erroneously led to believe that the information developed in the course of the

hypnosis was true and reliable recall. Second, once the appellant experienced the mental images during the supervised hypnosis or later self-induced states, he would be unable to distinguish them from other untainted memories. Third, other evidence regarding the appellant's relaxation habits and long-standing belief in his clairvoyance suggested the appellant would be inclined to self-induce hypnosis and further fill gaps in his memory with erroneous information. Most significantly, Doctor Orne testified that the use of the "zoom in" technique during the hypnosis could create in the appellant's mind a false mental picture of being close to the crime and, thus, create in him an erroneous belief that he was nearer the crime than he really was. The capstone of Doctor Orne's theory was that the appellant could not truly remember what happened on the night of the murder and that he yielded to the suggestions of his interrogators when their proposed explanations were consistent with his confabulated mental picture of having been near the crime.

During cross-examination Doctor Orne agreed that his theory was premised on certain essential determinations. First, that the appellant, in fact, had memory gaps regarding that night; and second, that the appellant was, in fact, hypnotized on 27 and 29 April and not simulating. Doctor Orne referred to the possibility that the accused entered subsequent trances as "reasonable conjecture." He conceded that he first conceived his theory in response to the specific facts of this case and that he was aware of no documented case in which the use of suggestive hypnotic techniques had caused an individual to alter his belief about where he was positioned while be observed the matters upon which the hypnotic session focused. He also agreed that his hypothesis did not explain how the appellant was able to provide accurate information about the crime and the crime scene.

C. *Per Se Rules*

It is true that many state courts have adopted *per se* rules barring the testimony of a witness whose memory has been probed in the course of hypnosis. The issue facing those courts was whether information recalled and discussed by a witness during hypnosis was sufficiently reliable to be admitted as evidence and considered by a jury. In those cases the information sought to be admitted had been discussed during hypnosis and the relationship of the information to the hypnotic episode was evident. *Alsbach v. Bader,* 54 L.W. 2330 (Mo. 1985); *Kater, supra; Gonzales, supra; Hughes, supra; Collins, supra; Shirley, supra; Mack, supra.* The issue, as posed on appeal in this case, however, is not the competence of a witness to testify, the reliability of hypnotically recalled information, or the diminishment of an accused's ability to effectively cross-examine. The issue is whether statements made by a suspect six months after hypnosis, regarding matters not discussed or revealed during the hypnotic sessions, and tending to contradict the fundamental premise of his hypnotic statements, were sufficiently reliable to be admitted in that suspect's criminal trial. Neither the expert testimony nor the scientific treatises submitted to the court provides sufficient basis to establish a *per se* rule of inadmissibility to the facts of this case. We find that Doctor Orne's theory raised the issue of voluntariness for determination by the military judge as to the admissibility of the statements. It also presented factual issues regarding the trustworthiness of the statements for determination by the court-members on the question of guilt. *See, Leyra v. Denno,* 347 U.S. 556 (1954).

D. ***The Use of Guidelines***

The Supreme Court of New Jersey has established guidelines regarding the use of information which has been discussed by a witness while under hypnosis. *State v. Hurd,* 432 A.2d 86 (N.J. 1981). The guidelines address various aspects of hypnotic interviews and suggest procedures to minimize the risk of confabulation. Conformity with the procedures reduces the risk of confabulation, increases reliability, and, thus, enables the information to be used at trial. Failure to conform to them reduces reliability and weakens the argument for admission at trial. The Army Court of Military Review applied such guidelines in a well written decision in *United States v. Harrington,* 18 M.J. 797, 803 (A.C.M.R. 1984). Like the *per se* rules, however, the guidelines approach addresses the admissibility of information revealed or discussed during hypnosis. As we have already noted, the issue before us is not the reliability of statements which are directly attributable to hypnosis. The issue is the admissibility of statements made six months later which address matters not revealed or discussed during hypnosis. We find that, despite appellant's arguments to the contrary, the guidelines approach was designed and adopted to confront facts, issues, and evidentiary concerns substantially different from those now before us. We, therefore, decline to apply such guidelines in this case.

E. ***Air Force Regulation 124-14***

Appellate counsel have also argued that the OSI acted contrary to Air Force Regulation (AFR) 124-14, *Forensic Hypnosis,* 17 December 1981, paragraph 2*b* when they hypnotized the appellant. The cited paragraph states, "subjects of investigations who may be prosecuted must not be hypnotized unless the subject or subject's counsel

requests it." The record before us, however, contains no evidence that the appellant had become the subject of the investigation at the time he was hypnotized. In addition, it is apparent that the cited provision was adopted to insure that investigators do not use hypnosis as a means of coercing subjects of investigations to confess. As such it addresses the issue of voluntariness, the same concerns as were addressed in *Leyra v. Denno, supra.* We find that AFR 124-14 was intended to provide operational guidance to Air Force investigators, judge advocates, and mental health professionals and was not intended to expand the protections afforded to hypnotized witnesses beyond those otherwise established in the Constitution and the Uniform Code of Military Justice. We will, therefore, determine the admissibility of the appellant's October statements on the basis of voluntariness and corroboration. *Wiley v. State,* 427 So.2d 283 (1983); and *Coon v. State,* 380 So.2d 980 (Ala. 1979), *vacated and remanded on other grounds,* 449 U.S. 810, *decision on remand* 405 So.2d 704, *aff'd on other grounds,* 431 So.2d 569 (1982).

F. *Voluntariness*

The military judge found the appellant's statement of 19 October 1982 were voluntary. He specifically found that:

1. the accused was properly advised of his rights under Article 31, Uniform Code of Military Justice (U.C.M.J.);

2. there was no evidence that the accused failed to understand his rights or the offenses under investigation;

3. the agents conducting the interview did not use force, threats, promises, or deception;

4. althogh the interview was long, there were breaks in the interrogation;

5. the interview was purposely scheduled during the accused's normal duty hours so as to avoid confronting him when he was tired;

6. there was no evidence the appellant was inordinately tired or fatigued and, as a result, unable to understand the consequences of his actions;

7. the interview was relaxed and friendly;

8. the accused was a high school graduate and an NCO of some experience and length of service;

9. the appellant did not enter a self-induced trance during the interrogation; and

10. hypnosis had no impact on the statement.

In addition to the trial court's findings of fact we note that the appellant left the session with a handshake and stated an intention to return the next day.

Appellant's counsel have urged us to consider the totality of the circumstances leading to the October statements. They have argued that the April and October interviews were "one continuous process" in which the government eroded the accused's will to remain silent. They cite *Leyra v. Denno,* 347 U.S. at 561. The evidence, however, proved otherwise.

On 16 April, eleven days before the first efforts to hypnotize the appellant, the appellant voluntarily contacted the OSI and told them he had observed suspicious movements in the service call room as he drove past it on the night of the murder. His first, non-hypnotic, statements included assertions about the assailant's possible identity and descriptions of the assailant's height, weight, hair color and clothing. They also included a description of the parking lot and the cars parked there. During the two hypnotic sessions the appellant maintained his premise that he had only driven past the crime scene. Those present at the two hypnotic interviews treated the

appellant as the witness he purported to be. The video tapes of the interviews reflect no efforts to overbear the appellant's will. The interviewers did not suggest that the appellant's statements were untrue, nor did they suggest that the appellant had entered the building or was culpably involved in the crime. Between April and October the appellant freely, and often without invitation, made many statements to the OSI and others in which he described what he purportedly saw as he drove past building 520 and suggested who the perpetrator might be. The evidence shows that the agents advised the appellant of his rights on 19 October and that, without persuasion of any sort, he waived his rights and agreed yet again to talk about the case.

The evidence consistently showed that the appellant voluntarily, and sometimes eagerly, sought to discuss the case with others including law enforcement authorities both before and after the hypnotic interviews. There was no evidence tending to confirm or illustrate Doctor Orne's theory that, between April and October, the hypnotic interviews, either directly or indirectly, caused the appellant to confabulate a false belief that he had entered the building. In fact, the appellant maintained his claim that he had only driven past the scene well into the 19 October interview. Thus, even if we assumed the April interviews violated the appellant's constitutional rights, the appellant's own repeated and uninvited efforts to talk about the case were wholly independent acts which effectively dissipated any arguable taint. *Wong Sun v. United States,* 371 U.S. 471 (1963); *see United States v. Collier,* 1 M.J. 358, 361 (C.M.A. 1976). The evidence fully supports the military judge's finding that the efforts to hypnotize the appellant had no impact on his October statements. We specifically find that the April interviews had no impact on the appellant's decision to waive his rights nearly

six months later and did not psychologically induce or coerce the appellant's final description of his actions at the crime scene. *Cf. Leyra v. Denno, supra.*

Finally, the record indicates the appellant was first advised of his Article 31, U.C.M.J., and *Miranda* rights on 24 April 1982 and that, although he had several subsequent discussions with OSI agents, he was not again advised of his rights until 19 October. The advice of rights on 24 April was mentioned only casually by one witness and was not probed by either party. Although trial defense counsel moved to suppress the statements made on 19 October, they premised their motion on the alleged effects of hypnosis, the allegedly coercive techniques attending the October interrogation, and the alleged lack of corroboration. They did not move to suppress the October statements as derivative of earlier statements unlawfully taken without advice of rights. Consequently, neither party developed the evidence or argued about whether the OSI agents advised the appellant of his rights at the other interviews or whether they were required to do so. We find that the issue of whether the October statements were derivative of earlier unlawful failures to advise the appellant of his rights was neither raised at trial nor preserved for appeal. Mil.R.Evid. 304(d)(2)(A), 304(e), 103(a)(1); and S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual, 79-80 (1981). Given the evidence before us, we find no plain error.

Having considered all the evidence, we find no error in the military judge's ruling regarding voluntariness. *United States v. Carmichael,* 21 U.S.C.M.A. 530, 45 C.M.R. 304 (1972); Mil.R.Evid. 304(c)(3); *see Stein v. New York,* 346 U.S. 156, 184-186 (1953); *cf. Darwin v. Connecticut,* 391 U.S. 346 (1968); *Clewis v. Texas,* 386 U.S. 707 (1967); *Reck v. Pate,* 367 U.S. 433 (1961); *Leyra v. Denno, supra;*

and *United States v. O'Such,* 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967).

G. *Corroboration*

Military Rule of Evidence 304(g)(1) states that independent evidence is corroborative if it raises "an inference of the truth of essential facts admitted." *United States v. Baran,* 19 M.J. 595 (A.F.C.M.R. 1984), *pet. granted,* 20 M.J. 143; *United States v. Poduszczak,* 20 M.J. 627 (A.C.M.R. 1985); S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual, 81 (1981). We find that the government presented more than enough evidence to raise an inference of the truth of the essential facts in the appellant's October statements.

The military judge found that the appellant's statements included two essential facts: first, that the appellant was in building 520 when the crime occurred, and, second, that he had intercourse with the victim while he was there. The appellant's admission that he was present included a detailed description of the victim's wounds and the crime scene. The military judge found that the government's proof corroborated the appellant's description of the victim's wounds, his description of the trail of blood in the hallway, his statement that he tidied the service call room, and his description of the position of the victim's body in the career advisor's office. He found further that the appellant's admission of intercourse was corroborated by the laboratory evidence correlating the appellant's blood type with the chemistry of the semen found in the victim's pubic hairs.

In addition to the trial court's findings, we note that the appellant described the trail of blood as being like that made when a deer is dragged by its hind quarters. He also described a hesitation spot in the bloody trail in front of

the career advisor's office. These statements were corroborated by independent evidence showing the existence of a hesitation spot and showing that the victim was most likely dragged down the hall by her feet. In addition, the evidence corroborated the appellant's statements that the intercourse occurred in the career advisor's office, that there was a pool of blood beside the victim's head, and that the victim remained clothed above the waist. The sufficiency and persuasiveness of the corroborating evidence were enhanced by evidence showing that the detailed information about the crime and crime scene provided in the appellant's statements was not generally known in the community. Thus, the government's proof amply corroborated the appellant's admissions that he was present during the assault of the victim and that he had intercourse with her at that time. We, therefore, find that the military judge was correct when he concluded the statements were adequately corroborated and when he denied appellant's motion to suppress.

III.

Having examined the record of trial, the assignment of errors, the government's reply thereto, and having considered the oral arguments of both parties, we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

SESSOMS and CANELLOS, Senior Judges, Concur.

OFFICIAL:

/s/ FELIX, LANDAU
FELIX LANDAU
Captain, USAF
Chief, Commissioner

APPENDIX C

EXCERPTED RULING OF THE MILITARY JUDGE ON PETITIONER'S MOTION TO SUPPRESS, RENDERED ON SEPTEMBER 1, 1983

On the issue of voluntariness, I am prepared to rule by a preponderance of the evidence: one, that the rights advisement was proper in accordance with Article 31 of the Uniform Code of Military Justice, that there is no reason to believe that the accused did not understand or misunderstood the nature of the crime that he was suspected of or the consequences of his willingness to converse with the agents; two, that there was no force, no threats, no promises, and no deception practiced by the agents; three, that while the interview lasted approximately thirteen hours in total time, not all of that time was dedicated to the interrogative process, but some of the time was consumed during breaks and other uses and waiting that was not part of the inquisitive concern. Additionally, while it lasted for a long period of time, it was purposely structured so as to not interfere with the accused's circadian rhythms in a clear effort to evade the possibility of abuse or abusing a tired man. There is no evidence that the accused was inordinately tired or fatigued and unable to understand the consequences of his action. Four, the manner of the interview was relaxed and friendly. There was not a scintilla of evidence that the interrogators were at any time threatening in any manner. Five, it was a custodial interrogation subsequent to the polygraph examination. Six, that the accused is a Staff Sergeant in the United States Air Force of some experience and length of service, that he's a high school graduate and appears to have been able to understand plain English. There is no evidence of a mental condition which preclude him to understand the rights advisement that were given to him or understand the situation that he found himself in.

Seven, I specifically reject the theory espoused by Doctor Orne concerning the self-induced trance as speculation.

Eight, hypnosis has no impact on the statement; and, finally, based on all the foregoing, I am satisifed concerning the totality of the circumstances, the statement given by this accused on 19-20 October of last year was voluntary. Therefore, that motion is denied.

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Supreme Court, U.S.
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CLERK

No. 88-612

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge erred by admitting into evidence statements made by petitioner six months after he was interviewed under hypnosis.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-23a) is reported at 26 M.J. 361. The opinion of the Air Force Court of Military Review (Pet. App. 24a-44a) is reported at 21 M.J. 937.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 15, 1988. The petition for a writ of certiorari was filed on October 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Kapaun Air Station in West Germany, petitioner, a member of the United States Air Force, was convicted of rape, forcible sodomy,

and premeditated murder, in violation of Articles 120, 125, and 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 918. He was sentenced to confinement for life, a dishonorable discharge, a reduction in rank to airman basic, and the total forfeiture of all pay and allowances. The convening authority approved the findings and sentence, except that he reduced the forfeiture of pay. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals affirmed.

1. In the early morning hours of April 14, 1982, the battered, semi-nude body of Senior Airman Nancy Nittler was found in the building of her duty station at Ramstein Air Base in West Germany. Tr. 4094-4096. On the night of her death, she had served as the Civil Engineering night dispatcher, handling evening and nighttime emergency calls. Tr. 693-694. The forensic examination of her body showed that she had been beaten, strangled, raped, anally sodomized, and ultimately killed by two stab wounds to her neck, one of which severed her jugular vein. Pet. App. 25a-26a; Tr. 766-785, 3447-3459, 3470-3518; PXs 15-26.

Two days later, petitioner told a co-worker that he had driven past the crime scene on the night of the murder and had seen "some guy behind the window." Petitioner made clear that the person he had seen was a Sergeant Banville. Tr. 931-935. Later that day, petitioner approached agents of the Office of Special Investigations (OSI) who were investigating the murder. Petitioner volunteered that he had driven by the victim's building and had seen a tall, shadowy male figure wearing a dark shirt standing the service desk area. Tr. 949-950. Petitioner mentioned that the person he had seen could have been an Airman Curtis. Tr. 950. Petitioner agreed to undergo hypnotic interviews with the OSI on April 27 and 29 to refresh his recollection

of the events. Pet. App. 4a-5a, 27a-28a; 23 Tr. AX (unnumbered), at 5.

Prior to the first session, petitioner gave a brief account of what he saw: a slim white male making a swinging motion with his arms, while his body was leaning into the effort. 23 Tr. AX (unnumbered) at 6. During the first hypnotic session, petitioner said that the person he saw through the window was swinging a pipe and was tall, white, with a slim build and light-colored hair. *Id.* at 19. He also said that the person he saw was wearing a red or green plaid shirt, weighed about 150 pounds, and was approximately 5'6" tall. *Id.* at 19, 21, 27. On April 29, during the second hypnotic interview, petitioner added that he could see another figure in the room who was smaller than the first man. *Id.* at 39. Petitioner stated that he saw the larger man strike the shorter one, and that, based on the fact that his hair protruded, the shorter man looked like one Captain Fuller. *Id.* at 48. Petitioner also said that the object that the assailant used to strike the victim resembled a microphone. *Id.* at 49. After the hypnotic portion of the interview was completed, petitioner stated his opinion that the assailant looked like the victim's husband, but was taller and heavier. *Id.* at 54; Pet. App. 5a, 28a.

One evening approximately two months later, petitioner walked into the service call desk area and spoke to a coworker. Tr. 984-985. Petitioner was extremely upset and emotional at the time. He said that he felt terrible about Nancy Nittler's death, and he mentioned that he wanted to talk to the OSI about it. Tr. 989. The OSI was summoned. As he awaited their arrival, petitioner said that a Staff Sergeant Brownell had killed Nancy. Tr. 991. Petitioner related that Brownell and the victim had been having an affair and that on the night of the murder he saw a black man with kinky hair making striking motions in the service call desk area. Tr. 992. When the OSI agents arrived, peti-

tioner told them that he had seen a late model yellow Buick Electra in the parking lot. Tr. 1016. Petitioner stated that he had purposely withheld that information from the OSI because he wanted to find the owner of the car and "lure him out." *Ibid.* Four days later, petitioner gave the OSI a written statement (PX 28), and he also explained that he had lied to the OSI agents during the hypnotic session about seeing figures through the window. He said that he had actually seen the image as a "vision" 15 minutes after he had returned home. Tr. 1020-1021. In that "vision," petitioner said, he had seen the victim being strangled and had seen blood on her face and forehead. Tr. 1021; Pet. App. 6a-7a.

During the next two months, petitioner volunteered information to the OSI and co-workers on several other occasions. Each time, petitioner gave a slightly different version of what he did and what he saw on the night of Nancy Nittler's murder. Pet. App. 15a. On September 15, petitioner approached his supervisor, Captain Fuller, in an intoxicated and distressed state, and he implied that he could have prevented the crime or could identify the murderer. Tr. 1046-1048. Captain Fuller, petitioner, and two others then returned to the scene of the murder to re-enact the crime. Tr. 1049-1052. Based upon what he saw at the scene of the crime, Captain Fuller concluded that petitioner could not have seen what he said he saw on the night in question. Tr. 1055; Pet. App. 7a, 28a.

Two OSI agents ultimately interviewed petitioner as a suspect on October 19. Tr. 1082, 1092-1093. During the initial part of the interview, petitioner related the same story that he had told them previously. Tr. 1084-1092. As the interview progressed and the agents challenged petitioner's story, however, that story began to change. First, petitioner admitted that he had actually walked up to the window, peered inside the room, and witnessed the events. Tr.

1094-1095. Later, after being confronted with the fact that the OSI had seized the jacket he wore that night, petitioner admitted that he had entered the building. Tr. 1102-1103. Petitioner said that he had seen the victim lying on the floor and that an unknown assailant had shoved him to the floor. Tr. 1103-1104. Petitioner then left the building, waited at his car, and re-entered the building 15 minutes later. Tr. 1104. When he returned, the victim's body was no longer in the room. Petitioner went to the service call area and straightened up the room. Tr. 1105-1107. He then followed a trail of blood to another room and saw the body. He described in detail the position and appearance of the victim. Tr. 1108. In fact, petitioner corrected one of the agents in describing the position of the body. Tr. 1108-1110, 1224-1225. Later, when confronted with the fact that sperm had been found in the victim's body and that the autopsy showed that she might have been alive when she was raped, petitioner admitted that he had partially disrobed and then had sexual intercourse with her while she was lying on the floor. Tr. 1115-1118. As the interview progressed, petitioner gave varying explanations about how blood could have gotten on his jacket (Tr. 1118-1122), and he ultimately concluded that he was "sixty to seventy percent" certain that the person who shoved him to the floor was one Ron Stenson, a co-worker. Tr. 1123-1124, 1242, 1245-1246; PX 32. Petitioner said that after having sexual intercourse with the victim, he left the building, drove home, opened a can of beans, sat down in a chair and watched television, went to bed, and had "a good night's sleep." Tr. 1127-1128. The interview then ended. After shaking hands with the interviewing agents and saying that he felt better after talking to them petitioner agreed to return the next day and continue the interview. Tr. 1128-1129, 1133. Petitioner did not return the next day, however; instead, he saw a psychiatrist and ulti-

mately reverted to his original story in which he said that he had merely driven by the building where the murder took place. Tr. 1129, 1784.

2. At trial, the defense moved to suppress petitioner's October 19 statements on the ground that they were involuntary and unreliable. Tr. 4138-4139; AX 17. As part of that claim, the defense alleged that the April 1982 hypnotic interviews had led petitioner to believe in events that were not true and had caused him to become vulnerable to the "suggestiveness" of the OSI agents who interviewed him six months later. Tr. 4138. Based on an extensive evidentiary presentation, the trial judge found that petitioner's October 19 statements were freely and voluntarily made. Pet. App. 45a-46a. The trial judge also found that the hypnotic interviews in April had no effect on petitioner's October statements. *Ibid.*; Tr. 4170-4171.

3. The Air Force Court of Military Review affirmed. Pet. App. 24a-44a. After examining the record, the court agreed with the trial judge's findings that petitioner's October statements were voluntary, were not affected by the April hypnotic sessions, and were sufficiently corroborated to support his conviction. *Id.* at 38a-43a. The court also rejected petitioner's argument that post-hypnotic statements should be inadmissible per se, or that they should be admissible only if rigorous safeguards to assure reliability are used during a hypnotic session. The court observed that other courts had adopted such procedures only for determining the admissibility of statements made while a witness is in fact undergoing hypnosis, and not for determining the admissibility of statements made several months afterwards regarding matters that were neither discussed nor revealed during hypnosis. *Id.* at 36a.

4. The Court of Military Appeals also affirmed. Pet. App. 1a-23a. After scrutinizing the various factors show-

ing that petitioner's October statements were reliable and noting that the defense was allowed to present expert testimony to the contrary (*id.* at 14a-15a, 21a-23a), the court found that the trial judge had properly admitted petitioner's October statements.

ARGUMENT

The sole question petitioner presents is whether there should be a per se rule of exclusion for hypnotically refreshed statements, or a rule demanding that rigorous procedural safeguards be used during a hypnotic session before hypnotically refreshed statements can be introduced at trial. This case does not present that question, however, because the only statements introduced by the government at trial were not affected by the hypnotic sessions.

The prosecution did not introduce the statements petitioner made during the April 27 and 29 hypnotic sessions. On the contrary, those statements were introduced by the defense (Tr. 1528-1529, 1679-1718). The government did introduce the statements petitioner made during the October 19 interview, but petitioner was not under the influence of hypnosis at that time. The trial judge (Pet. App. 46a), the court of military review (*id.* at 39a-43a), and the Court of Military Appeals (*id.* at 22a-23a) found that the April hypnotic sessions had no effect on petitioner's October statements to the OSI. In so ruling, those courts relied on several considerations: [of time (about six months) elapsed between the hypnosis and petitioner's later statements; there was a great disparity in the substance of the two statements; the hypnosis was conducted by a highly qualified expert under circumstances that minimized the likelihood of improper suggestion; petitioner did not display a willingness to accept blindly the agent's suggestions during the October interview, and in one instance petitioner convinced one of the agents that the

agent's account of the crime was in error and that petitioner was correct; and, finally, one expert even expressed doubt that petitioner was in a hypnotic state during the April sessions. *Id.* at 22a-23a; Tr. 1659-1660. Those concurrent findings do not warrant review by this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).

Those findings are also amply supported by the record. In fact, even the expert witnesses called by the defense could not conclude that the April hypnotic sessions left an impression on petitioner and caused him to make false statements six months later. Dr. Martin Orne, one of the nation's leading experts on forensic hypnosis, conceded that there was no direct connection between the April hypnotic sessions and petitioner's October admissions (Tr. 2478), and that it would be unique in his experience for hypnosis to cause someone falsely to confess six months afterwards. Tr. 2317, 2431-2432, 2463-2464; Pet. App. 13a & n.7. Another defense expert, Dr. Russell Hibler, stated that he saw no connection between the April hypnosis and petitioner's October statements. Tr. 3752. The third defense expert witness, Dr. Neil Hibler, also stated that he could not envision any such connection. Tr. 1719. Petitioner did not testify and offer any such claim. Finally, the excerpts cited by petitioner (Pet. 6) from the testimony of other defense witnesses do not support his claim that the April hypnotic sessions had an influence on him in October.* The trial court therefore did not err by admitting petitioner's October statements.

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* Dr. Mareth did not testify that petitioner was still under the influence of hypnosis when he spoke with the OSI agents in October. In fact, Dr. Mareth gave three possible explanations why petitioner may have given the October statement to the OSI agents: (a) petitioner was guilty and made up the story to explain the facts he believed were

The cases petitioner cites address an issue very different from the one presented in this case. The question of the admissibility of a witness's hypnotically refreshed testimony typically arises when the witness to a crime (often the victim) testifies at trial after a hypnotic session and identifies the defendant as the perpetrator. In such a case, the arguments commonly offered by the defense to exclude the witness's testimony are that the hypnosis has rendered the witness's testimony unreliable, and that hypnosis prevents the defendant from effectively cross-examining the witness. See, *e.g.*, *Harker* v. *Maryland,* 800 F.2d 437, 441-443 (4th Cir. 1986).

In this case it was petitioner who was hypnotized, and he is attempting to exclude his own admissions made six months after a hypnotic session in which he voluntarily participated. There was, therefore, no impairment of ef-

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known to the OSI; (b) petitioner was a shy person and made up the story to appear self-important; or (c) petitioner saw the murder, felt guilty about being unable to prevent it, and made up the story to ease his conscience. Tr. 3084-3085. The testimony by Dr. Hoyer that petitioner quotes (Tr. 3303) also does not attribute petitioner's statements to the April hypnosis. In fact, Dr. Hoyer admitted that he had "very little experience and very little training in hypnosis" (Tr. 3260), that he relied on what Dr. Orne, one of the defense experts, had told him (*ibid.*), that he "never meant to imply that the process of the investigation, the hypnosis, et cetera, would just fill in the gaps in the memory alone" (Tr. 3275), and that he developed a hypothesis explaining petitioner's October statements before he spoke with Dr. Orne. Tr. 3230. Dr. Hoyer's explanation for petitioner's statements was that they may have been the product of three factors: (a) petitioner was intoxicated at the time of the murder; (b) petitioner suffered from alcoholic blackouts and may have attempted to fill in the details of what he saw that night; and (c) petitioner believed that he was capable of "psychic" experiences. Tr. 3222-3225. Dr. Hoyer admitted, however, that the sanity board, of which he was a member, "did not make any definitive statements or arrive at any definitive conclusions as to [petitioner's] state of mind at the time [of the October statements]." Tr. 3222.

fective cross-examination of any witness, and petitioner was free to explain his incriminating admissions as being the product of his earlier hypnosis. Once the courts found that petitioner's admissions were voluntary and sufficiently reliable to be admitted, the question whether the admissions should be credited or not was properly left to the trier of fact. Accordingly, this case does not provide a suitable vehicle for addressing the broad questions presented by petitioner regarding the use at trial of a witness's hypnotically refreshed testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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